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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

SIDNEY HARLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1061

RICARDO SANTANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 11-14; R. 41-44)[a] is not yet reported. The opinion of the district court (R. 5-6, 37-38) is reported at 216 F. Supp. 631.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1964. By order of Mr. Justice Goldberg,

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[a] "R." refers to the printed record appendix filed with the Clerk.

the time for filing a petition for certiorari was extended to and including May 6, 1964. The petition for a writ of certiorari was filed on May 2, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a post office superintendent of mails may, without a warrant, inspect the contents of an unsealed fourth class parcel to determine whether it contains nonmailable matter.

STATUTES AND REGULATIONS INVOLVED

Section 4057 of Title 39 U.S.C. provides:

> Only an employee opening dead mail by authority of the Postmaster General, or a person holding a search warrant authorized by law may open any letter or parcel of the first class which is in the custody of the Department.

Section 4058 of Title 39 U.S.C. provides:

> (a) The Postmaster General may prescribe the manner of wrapping and securing mail not charged with first class postage so that the contents of the mail may be easily examined. He shall charge the first class rate of postage on all matter which cannot be examined easily.
>
> (b) To ascertain whether the proper rate of postage has been paid, postmasters may examine second class mail and remove the wrappers and envelopes from other mail not bearing first class postage if it can be done without destroying them.

Section 25.7 of Title 39 C.F.R. provides:

> Fourth-class mail must be wrapped or packaged so that it can be easily examined. Mailing of sealed parcels at the fourth-class rate of postage is deemed to be the consent of the sender to postal inspection of the contents. Patrons who desire to assure that their parcels will not be opened for postal inspection, should, in addition to paying the first-class rate of postage, plainly mark their parcels "First Class" or with similar endorsements.

Section 331.11 of the Postal Manual provides:

> Opening for Inspection. Do not break, or permit to be broken, the seal of first-class mail or open unsealed first-class letters or parcels while in the custody of the Postal Service, unless you are employed for that purpose in a dead letter branch or a dead parcel post branch. You must observe this rule always, even though you know the letter contains unmailable matter, criminal matter, or evidence for the conviction of a crime. Mail other than first class may be opened for postal inspection, except official mail weighing more than 4 pounds.

STATEMENT

In the United States District Court for the District of Puerto Rico, petitioner waived a jury trial and was found guilty under a one-count indictment charging that he deposited a package in the mail, knowing it to contain lottery tickets, in violation of 18 U.S.C. 1302. He was fined $500 (R. 7). The court of appeals unanimously affirmed (Pet. 11-14).

The only issue is the correctness of the ruling denying petitioner's motion to suppress (R. 37-38). The undisputed facts are that, on January 27, 1961, petitioner presented for mailing at a parcel post window in Puerto Rico a package weighing between three and four pounds, wrapped in paper and tied with a string; that the package, whose addressee was in New York, was sent air mail, special delivery, and insured (R. 24-25, 29); that after petitioner departed, the clerk, suspecting that the package contained nonmailable meat delicacies, took it to the superintendent of mails (R. 25); that, since the package was not mailed first class, the superintendent opened it for postal inspection (R. 30); and that he removed the twine, unwrapped the paper, and found a box containing 55 lottery tickets (R. 29).

ARGUMENT

There is no merit in petitioner's contention that an unsealed package mailed as fourth class matter may not be opened without a warrant for postal inspection. Postal regulations specifically permit such examination, Postal Manual 331.11, and provide that, if the sender wishes to keep the contents of his package secret, he may post the package as first class matter. 39 C.F.R. 25.7.

These regulations are consistent with applicable constitutional and statutory provisions. This Court has observed that the Fourth Amendment protection against unreasonable search and seizure of one's papers and effects extends to "letters, and sealed pack-

ages subject to letter postage" which are deposited in the mails with the intention that they be free from inspection, as distinguished from other mail matters "which are open to inspection. *Ex Parte Jackson*, 96 U. S. 727, 733; see *Weeks* v. *United States*, 232 U. S. 383, 390-391. The package in this case was not sealed; it was posted, not as first class matter, but as fourth class parcel post.[1] Under such circumstances the inspection permitted by the postal regulations did

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[1] The dissenting and concurring opinions cited by petitioner (Pet. 8) do not support his attack on *Ex Parte Jackson*. The concurring opinion in *Manual Enterprises* v. *Day*, 370 U. S. 478, 503, questioned the power of the Post Office to open *sealed* mail of any class. The dissenting opinion in *Sunshine Book Co.* v. *Summerfield*, 249 F. 2d 114, 120 (C.A. D.C.), reversed, 355 U.S. 372, questioned the power of the Post Office to censor mail. And the dissenting opinion in *Roth* v. *United States*, 354 U.S. 476, 504-505, related to an aspect of *Ex Parte Jackson* not involved in the instant case.

[2] The package was wrapped with paper and tied with twine, a minimum wrapping appropriate for any class of mail, 39 C.F.R. 11.4, and apparently a means of wrapping meeting the Post Office requirement that it lend itself to easy examination, 39 C.F.R. 25.7.

[3] The court of appeals observed that the air parcel post rate from Puerto Rico would be the same for any class mail, 39 U.S.C. 1303, but that as the package was insured, and as only third and fourth class mail can be insured, 39 U.S.C. 5006, the package must have been posted as third or fourth class matter (Pet. 13a). This conclusion is consistent with the testimony of the superintendent of mails (R. 30-31). Petitioner does not now contest the determination that the package was mailed as other than first class matter. As the package exceeded the weight limitations of mail of the third class, 39 U.S.C. 1151, it was plainly of the fourth class.

not violate petitioner's Fourth Amendment rights. *Webster* v. *United States*, 92 F. 2d 462 (C.A. 6).

Petitioner contends that 39 U.S.C. 4058(b) limits an otherwise permissible inspection to ascertaining whether the proper rate of postage has been paid (Pet. 10). This argument overlooks 39 U.S.C. 4058(a), providing that "[t]he Postmaster General may prescribe the manner of wrapping and securing mail not charged with first class postage so that the contents of the mail may be easily examined." The clear implication is that other than first class mail may be examined for purposes beyond checking the sufficiency of the postage. The Notes show that the present Section 4058 was intended to incorporate, *inter alia*, the first part of Section 243 of Title 39, U.S.C., 1952 edition (20 Stat. 360 (1879)). That section began "All matter of the fourth class shall be subject to examination," and the remainder of the section showed that such examination could be for the purpose of discovering nonmailable matter. The objective of the present Title 39 was to consolidate, simplify, and restate existing law, and not to make new law. S. Rep. No. 4763, 86th Cong., 2d Sess., 3, 5 (1960); H. Rep. No. 36, 86th Cong., 1st Sess., 3 (1959). It is therefore evident that the present section was not intended to be more restrictive than the former sections it encompassed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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